Arkansas Model Contract Jury Instructions WEB PAGE

What follows are PRELIMINARY drafts of proposed instructions pertaining to commercial litigation. These are posted for comment. Comments and suggestions regarding these drafts should be sent promptly to:

Arkansas Supreme Court Committee on Jury Instructions - Civil
c/o Clerk, Supreme Court of Arkansas
Justice Building
625 Marshall Street
Little Rock, AR 72201

Comments or suggestions may also be directed by e-mail to Larry Brady. Please refer to "AMI Committee." The Committee plans to complete and publish these instructions in the fall of 2000.

THESE INSTRUCTIONS ARE PRELIMINARY AND ARE NOT ENTITLED TO THE PRESUMPTION OF VALIDITY CREATED FOR PUBLISHED INSTRUCTIONS BY THE PER CURIAM ORDER OF THE SUPREME COURT OF ARKANSAS DATED APRIL 19, 1965, EFFECTIVE FEBRUARY 1, 1966.

ARKANSAS MODEL CONTRACT JURY INSTRUCTIONS

Presented for Comment
by the Arkansas Supreme Court Committee
On Model Jury Instructions - Civil
June 12, 2000

[Reflecting changes suggested by the Committee on June 10, 2000]

ARKANSAS MODEL CONTRACT JURY INSTRUCTIONS

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Contracts

The Committee has prepared model instructions which are intended to cover most issues that may arise in a typical contract case. Because issues may arise in some contract cases that require special instructions which are beyond the scope of these model instructions, trial courts and practitioners should be prepared to develop and give appropriate special instructions covering those issues.

The Committee's task in preparing these model instructions was made substantially easier by the work of the Jury Instructions Subcommittee of the Business Law Section of the Arkansas Bar Association, which was published as an article entitled "Proposed Arkansas Model Contract Jury Instructions," 20 UALR Law Journal 1 (1997). The Committee extends its gratitude to the authors of that law review article for their significant contribution to this project, as well as their countless hours of hard work and legal scholarship.

The Committee has elected not to promulgate instructions covering all of the issues which are addressed in the proposed instructions contained in the law review article. First, because the Committee's charge was to publish a basic set of contract instructions, it chose to cover only those issues which frequently arise in such cases. Second, the Committee does not believe Arkansas law is sufficiently developed to support model instructions on some of the issues which are addressed in the law review article. As the Arkansas appellate courts decide such issues or as practitioners express a need for instructions on those issues, the Committee will consider additional model instructions. Until such model instructions are published or until the Arkansas Supreme Court releases opinions on undecided issues which are covered by proposed instructions in the law review article, the Committee respectfully issues a caveat to practitioners to exercise caution in using the instructions in the law review article, some of which may be questionable under Arkansas law.

Finally, the Committee has attempted to organize these instructions in the order issues in contract cases often develop. However, courts and practitioners should not be constrained by the organization and should organize the instructions for particular cases in the manner which most clearly presents the issues to the jury.

AMI 3001
Issues - Breach of Contract

Plaintiff claims that Defendant breached a contract and has the burden of proving each of four essential propositions:

> First, that Plaintiff and Defendant entered into a contract;
>
> Second, that the contract required Defendant to perform or not to perform a certain act;
>
> Third, [that Plaintiff did what the contract required of him][that (Plaintiff's) performance was excused]; and

Fourth, that Defendant did not do what the contract required of him.

[If you find that the Plaintiff has proved each of these propositions, then your verdict should be for the Plaintiff. If, however, Plaintiff has failed to prove any one or more of these propositions, then your verdict should be for the Defendant.]

NOTE ON USE

Use the appropriate bracketed portion of the third element. If the second portion of the third element is used, also use AMI 3027.

The final bracketed paragraph of the instruction should not be given when the case is submitted on interrogatories.

When a party seeks damages, also use AMI 3042.

Use AMI 3028 with this instruction when there is an issue as to substantial performance.

COMMENT

Under Arkansas law, actual damage is not an essential element of a claim for breach of contract. Dawson v. Temps Plus, Inc., 337 Ark. 247, 987 S.W.2d 722 (1999); Dilley v. Thomas, 106 Ark. 274, 153 S.W. 110 (1913); Western Union Tel. Co. v. Aubrey, 61 Ark. 613, 33 S.W. 1063 (1896); Blair v. U.S. for Use and Benefit of Gregory-Hogan, 150 F. 2d 676 (8th Cir. 1945). If nominal damages are appropriate, refer to AMI 418 and modify that instruction for use in a contract case.

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AMI 3002
Issues - Contract Formation

To establish [a] [an implied] contract, Plaintiff has the burden of proving each of three essential propositions:

First, that (Plaintiff) made an offer to enter into a contract which was accepted by (Defendant);

Second, that there was an exchange of consideration; and

Third, that at the time the contract was made, its essential terms were reasonably certain and agreed to by both (Plaintiff) and (Defendant);

NOTE ON USE

Use the bracketed language "an implied" when a party alleges that their contract was implied.

If there is no dispute as to the existence of a contract between the parties, use AMI 3003.

COMMENT

Under Arkansas case law, certain elements of a valid contract - subject matter and legal consideration - are matters of law for the court to decide. *See* Bene v. New York Life Ins. Co., 191 Ark. 714, 87 S.W.2d 979, 981 (1935) (subject matter). Therefore, only those elements of a contract which present fact questions for the jury are set forth in this instruction.

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AMI 3003

No Dispute As To Existence Of Contract

The parties do not dispute that (Name of one contracting party) and (Name of other contracting party) entered into a contract.

NOTE ON USE

Use this instruction when the parties do not dispute the existence of the contract underlying the cause of action. The instruction is formatted to be used in any case, including the case where the plaintiff is a third-party beneficiary of the contract.

If this instruction is used, do not use AMI 3002, 3004, 3005, 3006, 3007, 3008 or 3009.

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AMI 3004
Contract Express or Implied

A contract may be express or implied. [An express contract may be oral or written.] [An implied contract is created by the conduct of the parties or their course of dealing. In determining whether an implied contract was formed between the plaintiff and the defendant, you should consider the parties' conduct and course of dealing from the viewpoint of a reasonable person, considering all of the surrounding circumstances.]

NOTE ON USE

Use this instruction if there is an issue as to whether the parties had a valid contract because all or part of the contract is either oral or implied. Use the appropriate bracketed sentences.

When this instruction is used, it should immediately follow AMI 3001. Immediately after this instruction, AMI 3002 should be given.

COMMENT

See Steed v. Busby, 268 Ark. 1, 593 S.W.2d 34 (1980); Downtowner Corp. v. Commonwealth Securities Corp., 243 Ark. 122, 419 S.W.2d 126 (1967); Phillips v. Marist Soc. of Washington Province, 80 F.3d 274 (1996).

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AMI 3005
Definition - "Offer" & "Acceptance"

When I use the word "offer," I mean a proposal to enter into a contract which invites acceptance by the party to whom it is directed. An offer must be communicated by words or conduct to the other party.

A party "accepts" an offer when he demonstrates his unconditional agreement to the terms of the offer. "Acceptance" may reasonably be implied from words or conduct, and it must occur before the offer is withdrawn or lapses.

[Silence and inaction do not ordinarily constitute acceptance. (However, a party who knowingly accepts the benefits of a proposed contract is bound by its terms.)]

NOTE ON USE

Use this instruction when AMI 3002 is given.

Insert the bracketed sentence when warranted by the evidence. If the bracketed sentence is inserted, use the sentence in parentheses if one party alleges that the other party knowingly accepted the benefits of a proposed contract. The Committee included this sentence because the situation occurs frequently in contract cases. If a case contains another situation recognized by law in which silence and inaction constitute acceptance, an appropriate sentence should be substituted for the sentence in parentheses.

COMMENT

Arkansas case law does not provide a workable definition of "offer." *See* ERC Mortg. Group, Inc. v. Luper, 32 Ark. App. 19, 795 S.W.2d 362 (1990) (citing definition of offer found in the Restatement (Second) of Contracts). This definition is conceptually identical to the Restatement definition and accurately states Arkansas law.

Although Arkansas case law does not set forth a concise definition of "acceptance," this definition is in accord with Arkansas cases. An acceptance does not become a counteroffer merely by reciting terms that were implied in the original offer. *See* Byford v. Gates Bros. Lumber Co., 216 Ark. 400, 225 S.W.2d 929 (1950).

Silence may constitute acceptance in certain special circumstances, such as long-term dealings and settled customs and practices between the parties. *See* 17A Am.Jur.2d § 103.

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AMI 3006
Definition - "Consideration"

When I use the term "consideration," I mean something of value which must be bargained for and given in exchange for a promise.

"Something of value" may consist of a promise -- such as a promise to pay money or to perform a service or to deliver goods; an act -- such as the payment of money, the delivery of goods or the performance of services; or a forbearance -- such as giving up the right to sue, the right to compete or the right to perform a certain act.

[An act already completed cannot be consideration for a later contract.]

[{Likewise,} a promise by a person to do something which he already has an obligation to do cannot be consideration for a contract, except where the existence of the duty is the subject of a reasonable dispute.]

NOTE ON USE

Insert the bracketed paragraphs when warranted by the evidence. The second paragraph is designed to be used in nearly every case. However, if there is another specific example of a promise, act or forbearance which either should be added to or substituted for one of the enumerated examples in a particular case, the instruction should be modified.

COMMENT

Consideration is often a difficult concept for a jury to understand. The instruction is in accord with the definition most often cited in Arkansas case law. *See* Bass v. Service Supply Co., Inc., 25 Ark. App. 273, 757 S.W.2d 189 (1988); McIlroy Bank & Trust Co. v. Comstock, 13 Ark. App. 13, 678 S.W.2d 782 (1984).

This instruction does not address the rare case in which the consideration passes to or from a third party. *See* John Deere Co. v. Broomfield, 803 F.2d 408 (8th Cir. 1986) (applying Arkansas law).

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AMI 3007
Definition - "Reasonably Certain"

When I say the contract's essential terms must be "reasonably certain," I mean that the terms must provide a basis for determining the existence of a breach and for giving an appropriate remedy.

[If the terms of the contract are uncertain, the contract may still be valid if the actions of the parties provide meaning to the uncertain terms.]

NOTE ON USE

Insert the bracketed paragraph when warranted by the evidence.

COMMENT

See Restatement (Second) of Contracts § 33(2) (1981). *See also* Ciba-Geigy Corp. v. Alter, 309 Ark. 426, 834 S.W.2d 136 (1992); Swafford v. Sealtest Foods Div. of Nat'l Dairy Prod. Corp., 252 Ark. 1182, 483 S.W.2d 202 (1972); Beasley v. Boren, 210 Ark. 608, 197 S.W.2d 287 (1946).

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AMI 3008
Duration of Offer

When an offer has been made, it can be accepted [until withdrawn] [until rejected] [during the time specified in the offer] [during the time customary in the trade or business of the parties] [within a reasonable time, if no time is specified].

[An offer to enter into a contract may be withdrawn at any time before it is accepted. In order to withdraw the offer, the party who made the offer must communicate that he is no longer willing to enter into the contract. To be effective, the communication of the withdrawal must be (received by the party to whom the offer was made) (received by a person authorized to receive such communications) (deposited in some place that has been authorized for such communications to be deposited.)]

[If a party to whom an offer is made responds by proposing new terms or imposing conditions not contained or implied in the original offer, that offer is rejected and may not thereafter be accepted.]

NOTE ON USE

Use this instruction when there is an issue as to whether the offer could be accepted. Use the appropriate bracketed clause or clauses in the first paragraph.

If there is an issue as to whether the offer was withdrawn before acceptance, insert the first bracketed paragraph.

If there is an issue as to whether the offer was rejected, use the second bracketed paragraph.

COMMENT

See Kempner v. Cohn, 47 Ark. 519, 1 S.W. 869 (1886); Restatement (Second) Of Contracts § 68 (1981); *Smith v. School District No. 89*, 187 Ark. 405, 59 S.W.2d 1022 (1933).

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AMI 3009
Counteroffer

If a party to whom an offer is made responds to the offer by proposing additional terms or conditions, the response may constitute a counteroffer, which may thereafter be accepted by the other party. In order for a response to constitute a counteroffer, it must meet the requirements of an "offer," as previously defined in these instructions.

NOTE ON USE

Use this instruction when it is alleged that a counteroffer was made by one party. Use this instruction with AMI 3005.

COMMENT

Tucker Duck & Rubber Co. v. Byram, 206 Ark. 828, 177 S.W.2d 759 (1944); Byford v. Gates Bros. Lumber Co., 216 Ark. 400, 225 S.W.2d 929 (1950). An acceptance does not become a counteroffer merely by reciting terms that were implied in the original offer. Byford v. Gates Bros. Lumber Co., *supra.*

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AMI 3010
Issues - Breach of Contract - Third Party Beneficiary Status Issue of Fact

(Plaintiff) claims damages from (Defendant) for breach of contract as a third party beneficiary of a contract between (Name of contracting party) and (Defendant) and has the burden of proving each of five essential propositions:

First, that (Name of contracting party) and (Defendant) entered into a contract;

Second, that (Name of contracting party) and (Defendant) clearly intended to benefit (Plaintiff) under the contract;

Third, that the contract required (Defendant) to perform or not to perform a certain act;

Fourth, that (Name of contracting party) did what the contract required of him; and

Fifth, that (Defendant) did not do what the contract required of him.

[If you find that (Plaintiff) has proved each of these propositions, then your verdict should be for (Plaintiff). If, however, (Plaintiff) has failed to prove any one or more of these propositions, then your verdict should be for (Defendant).]

NOTE ON USE

Use this instruction instead of AMI 3001 when the plaintiff's contract claim is based upon his status as a third party beneficiary and the court has determined that the issue whether he is a

third party beneficiary should be submitted to the jury. If the court has determined as a matter of law that the first two elements have been established or if there is no dispute as to one or more of those elements, use AMI 3011.

The bracketed part of the instruction should not be given when the case is submitted on interrogatories.

COMMENT

Whether a person is a third party beneficiary to a contract is often a question of law for the court. Kremer v. Blissard Management & Realty, Inc., 289 Ark. 419, 421, 711 S.W.2d 813, 815 (1986). *See also* Little Rock Wastewater Utility v. Larry Moyer Trucking, Inc., 321 Ark. 303, 902 S.W.2d 760 (1995); Howell v. Worth James Constr. Co., 259 Ark. 627, 535 S.W.2d 826 (1976). However, when the contract is ambiguous and the meaning of the ambiguous language depends upon disputed extrinsic evidence, there may be an issue of fact for the jury as to whether a person is a third party beneficiary.

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AMI 3011

Issues - Breach of Contract - Third Party Beneficiary Status Not An Issue of Fact

(Plaintiff) claims damages from (Defendant) for breach of contract as a third party beneficiary of a contract between (Name of contracting party) and (Defendant). The court has already determined that [there was a contract between (Name of contracting party) and (Defendant) and that] (Plaintiff) is a third party beneficiary of the contract. (Plaintiff) has the burden of proving each of four [three] essential propositions:

[First, that (Name of contracting party) and (Defendant) entered into a contract;]

Second [First], that the contract required (Defendant) to perform or not to perform a certain act;

Third, [Second], that (Name of contracting party) did what the contract required of him; and

Fourth [Third], that (Defendant) did not do what the contract required of him.

[If you find that (Plaintiff) has proved each of these propositions, then your verdict should be for (Plaintiff). If, however, (Plaintiff) has failed to prove any one or more of these propositions, then your verdict should be for (Defendant).]

NOTE ON USE

Use this instruction when the court has determined as a matter of law that the plaintiff is a third party beneficiary of the contract at issue. If the court has also determined that there is a contract or if the parties do not dispute that there is a contract, omit the first bracketed essential element and use the appropriate bracketed provisions in the opening paragraph.

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Contract Interpretation
Introduction

A jury should not be called upon to interpret a contract unless it contains an ambiguity. A provision in a contract is ambiguous when it is susceptible to two or more reasonable interpretations. Phelps v. U.S. Life Credit Life Ins. Co., 336 Ark. 257, 984 S.W.2d 425 (1999). If a provision of a contract is unambiguous, its construction is an issue of law for the trial court. However, if an ambiguity exists in the contract, the meaning of the ambiguous provision becomes an issue for the fact-finder. "The initial determination of the existence of an ambiguity in a contract rests with the trial court, and if an ambiguity exists, the meaning becomes a question of fact for the fact finder." Keller v. Safeco Ins. Co. of America, 317 Ark. 308, 877 S.W.2d 90 (1994) (citing Minerva Enter. Inc. v. Bituminous Cas. Corp., 312 Ark. 128, 851 S.W.2d 403 (1993)); *see also*, Kanning v. Allstate Ins. Cos., 67 Ark. App. 135, 992 S.W.2d 831 (1999); Fryer v. Boyett , 64 Ark. App. 7, 978 S.W.2d 304 (1998). "Whether the language of the policy is ambiguous is a question of law to be resolved by the court." Western World Ins. Co., Inc. v. Branch, 332 Ark. 427, 965 S.W.2d 760 (1998). Thus, the following instructions, with the exception of AMI 3023, should be given only when the court has made the initial determination of the existence of an ambiguity. AMI 3023 may be necessary in cases in which there is no alleged ambiguity. In addition, the use of these instructions should be tailored to the particular interpretation issue presented.

In Smith v. Prudential Property & Cas. Ins. Co., 340 Ark. 335, 10 S.W.3d 846 (2000), the Supreme Court clarified the law regarding the interpretation of ambiguous contracts. The Court held that even when a contract is ambiguous, if the meaning of the ambiguity does not depend on disputed extrinsic evidence, the construction and legal effect of the contract remains a question of law. *Id.* The Court expressly overruled Farm Bureau Mutual Ins. Co. v. Whitten, 51 Ark. App. 124, 911 S.W.2d 270 (1995), to the extent that *Whitten* held that when the terms of a written contract are ambiguous, its meaning is *always* a question of fact.

These instructions should not be given in cases involving the interpretation of ambiguous provisions of insurance contracts in which the insured had no opportunity to negotiate or change the terms of the contract, and the meaning of the ambiguity does not depend on disputed extrinsic evidence.. The Arkansas Supreme Court and Court of Appeals have made it clear that in such cases, all ambiguities will be resolved the favor of the insured as a matter of law. *See* Smith v. Prudential Property & Cas. Ins. Co., 340 Ark. 335, 10 S.W.3d 846 (2000); *see also* Phelps v. U.S. Credit Life Ins. Co., 336 Ark.. 257, 261-262, 984 S.W.2d 425, 428 (1999); Unigard Sec. Ins. Co. v. Murphy Oil USA, Inc., 331 Ark. 211, 962 S.W.2d 735 (1998); Noland v. Farmers Ins. Co., Inc., 319 Ark. 449, 452, 892 S.W.2d 271, 272 (1995).

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Contract Interpretation
General Rule - Ambiguity in Language

The parties dispute the meaning of the following language in their contract:

[*Insert ambiguous language*]

It is your duty to interpret the contract to give effect to what the parties intended when they made their agreement. In determining the meaning of the language, you must take into consideration the language of the contract, the circumstances surrounding the making of the contract, the subject of the contract, the purpose of the contract, the situation and relation of the parties at the time the contract was made, the parties' subsequent course of performance, [the parties' prior course of dealing,] [(and) custom in the trade].

_____

NOTE ON USE

This instruction should be given only if the court has determined that the contract contains ambiguous language, and that the meaning of the ambiguous language depends upon disputed extrinsic evidence.

Insert the bracketed language when warranted by the evidence. Insert the "and" at the appropriate point in the final clause.

If the ambiguity involves a single word or short phrase, the first sentence may be modified to state, "The parties dispute the meaning of the term '_____' in their contract."

COMMENT

The first sentence of the second paragraph is based upon the widely recognized "first rule" of contract interpretation that the finder of fact must give the language employed the meaning which the parties intended. *See* Dugal Logging, Inc. v. Arkansas Pulpwood Co., 66 Ark. App. 22, 988 S.W.2d 25 (1999); First Nat'l Bank of Crossett v. Griffin, 310 Ark. 164, 832 S.W.2d 816 (1992); Sutton v. Sutton, 28 Ark. App. 165, 771 S.W.2d 791 (1989); Schnitt v. McKellar, 244 Ark. 377, 427 S.W.2d 202 (1968).

In Smith v. Prudential Property & Cas. Ins. Co., 340 Ark. 335, 10 S.W.3d 846 (2000), the Supreme Court made it clear that even when a contract is ambiguous, if the meaning of the ambiguity does not depend on disputed extrinsic evidence, the construction and legal effect of the contract remain questions of law.

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AMI 3013
Contract Interpretation
Ordinary Meaning

You should give the words of a contract their plain, ordinary, and usual meaning, unless it is

clear that certain words were intended to be used in a technical sense.

COMMENT

See Skokos v. Skokos, 332 Ark. 520; 968 S.W.2d 26 (1998); First Nat 'l Bank of Crossett v. Griffin, 310 Ark. 164, 832 S.W.2d 816 (1992); Wilkes v. Stacy, 113 Ark. 556, 169 S.W. 796 (1914); Boatmen's Arkansas, Inc. v. Farmer, 66 Ark. App. 240, 989 S.W.2d 557 (1999).

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AMI 3014
Contract Interpretation
Words or Phrases of a Particular Trade or Occupation

You should interpret words or phrases associated with a particular trade or occupation as experienced and knowledgeable members of that trade or occupation use them, unless the evidence discloses that the parties used them in a different sense.

NOTE ON USE

Use this instruction only when warranted by the evidence.

COMMENT

See Les-Bil, Inc. v. General Waterworks Corp. 256 Ark. 905, 511 S.W.2d 166 (1974); Wilkes v. Stacy, 113 Ark. 556, 169 S.W. 796 (1914).

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AMI 3015
Contract Interpretation
Interpretation by Course of Performance

You should give weight to the meaning placed on the language by the parties themselves, as shown by their statements, acts or conduct after the contract was made.

NOTE ON USE

Use this instruction only when warranted by the evidence.

COMMENT

See RAD-Razorback Ltd. Partnership v. B.G. Coney Co., 289 Ark. 550, 713 S.W.2d 462 (1986); Wynn v. Sklar & Phillips Oil Co., 254 Ark. 332, 493 S.W.2d 439 (1973); Northwest National Bank v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 25 Ark. App. 279, 757 S.W.2d 182 (1988); Welch v. Cooper, 11 Ark. App. 263, 670 S.W.2d 454 (1984).

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AMI 3016
Contract Interpretation
Course of Dealing

The parties' intent may be shown by their prior course of dealing. A course of dealing is conduct between the parties before the making of their contract that can be fairly regarded as establishing a common basis of understanding for interpreting their expressions and other conduct.

NOTE ON USE

Use this instruction only when warranted by the evidence.

COMMENT

See Restatement (Second) of Contracts §223 (1981); Ark. Code Ann. §4-1-205(1).

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AMI 3017
Contract Interpretation
Custom in the Trade

The parties' intent may be shown by custom in the trade. A custom in the trade is any practice or method of dealing that is uniform, reasonable, and so well established in the trade as to justify an expectation that it will be observed with respect to the contract in question.

NOTE ON USE

Use this instruction when warranted by the evidence.

COMMENT

See Restatement (Second) of Contracts §222 (1981); Ark. Code Ann. §4-1-205(2).

In Venturi, Inc. v. Adkisson, 261 Ark. 855, 857, 552 S.W.2d 643, 645 (1977), the Arkansas Supreme Court stated that evidence of custom and usage is not admissible to vary, contradict or defeat the terms of a contract. However, if custom and usage is uniform, reasonable and well established, it may govern the terms of a contract and may be considered part of the contract unless contradictory to the express terms of the contract.

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AMI 3018
Contract Interpretation
Construction of Express Terms, Course of Dealing and Custom in the Trade

The express language of a contract and any applicable [course of performance], [course of dealing] or [custom in the trade], as previously defined for you, should be interpreted to be consistent with each other if such an interpretation is reasonable. If such an interpretation is not reasonable, the express terms of a contract should be given greater weight than [course of performance], [course of dealing] and [custom in the trade.] [Course of performance should be given greater weight than (course of dealing) (or) (custom in the trade)]. [Course of dealing should be given greater weight than custom in the trade.]

NOTE ON USE

Use this instruction only when warranted by the evidence.

Insert the appropriate bracketed and parenthetical terms and sentences.

COMMENT

See Restatement (Second) of Contracts §203 (1981); Ark. Code Ann. §4-1-205(2); Venturi, Inc. v. Adkisson, 261 Ark. 855, 552 S.W.2d 643 (1977).

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AMI 3019
Contract Interpretation
Language of the Contract Should Be Interpreted as a Whole

A contract must be interpreted as a whole. The different clauses of the contract must be read together and interpreted, if possible, so that all of the parts are consistent with each other. An interpretation which fails to give effect to any provision of a contract cannot be adopted if the contract can be interpreted in a way that gives effect to all of its provisions.

NOTE ON USE

Use this instruction only when warranted by the evidence.

If the contract is contained in more than one document, AMI 3020 should be given instead of this instruction.

COMMENT

See RAD-Razorback Ltd. Partnership v. B.G. Coney Co.. 209 Ark. 550, 713 S.W.2d 462

(1986); Fryer v. Boyett, 64 Ark. App. 7, 11, 978 S.W.2d 304, 306 (1998).

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AMI 3020
Contract Interpretation
Contract Composed of More than One Document

If the parties' contract is contained in more than one document, all of the documents must be considered together. The different clauses of the documents which make up the contract must be read together and, if possible, interpreted so that all of their parts are consistent with each other. An interpretation which fails to give effect to any provision of a contract cannot be adopted if the contract can be interpreted in a way that gives effect to all of its provisions.

NOTE ON USE

Use this instruction only when warranted by the evidence.

If the contract is contained in one document, AMI 3019 should be given instead of this instruction.

COMMENT

See RAD-Razorback Ltd. Partnership v. B.G. Coney Co., 289 Ark. 550, 713 S.W.2d 462 (1986); Fryer v. Boyett, 64 Ark. App. 7, 11, 978 S.W.2d 304, 306 (1998).

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AMI 3021
Contract Interpretation
Specific And General Provisions

If there is a contradiction between general provisions and more detailed, specific provisions in a contract, the specific provisions ordinarily qualify the meaning of the general provisions.

NOTE ON USE

Use this instruction only when warranted by the evidence.

COMMENT

See Restatement (Second) of Contracts §203 and cmt. e (1981); Pate v. Goyne, 212 Ark. 51, 204 S.W.2d 900 (1947); Missouri Pacific Railroad Co. v. Winburn Tile Manufacturing Co., 461 F.2d 984 (8th Cir. 1972).

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AMI 3022
Contract Interpretation
Written or Typewritten Provisions Control Provisions of Preprinted Forms

If a contract contains handwritten or typewritten provisions that are contradictory to the provisions of a preprinted form, the handwritten or typewritten provisions control.

NOTE ON USE

Use this instruction only when warranted by the evidence.

COMMENT

See Leonard v. Merchants & Farmers Bank, 290 Ark. 571, 720 S.W.2d 908 (1986); Stacy v. Williams, 38 Ark. App. 192, 834 S.W.2d 156 (1992); Restatement (Second) of Contracts, § 203, cmt. f (1981).

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AMI 3023
Contract Interpretation
Time Not Expressed-Reasonable Time

When a contract is silent as to when it must be performed, the law requires that it must be performed within a reasonable time. In determining whether the contract was performed within a reasonable time, you should consider the nature of the contract, the situation of the parties and the circumstances surrounding the performance.

NOTE ON USE

Use this instruction only when warranted by the evidence.

As noted in the Introduction to Contract Interpretation, this instruction may be appropriate in cases in which there is no alleged ambiguity.

COMMENT

See Restatement (Second) of Contracts §204, cmt. d (1981); Ark. Code Ann. §§4-1-204 and 4-2-309(1). *See also* Laird v. Lacey, 263 Ark. 570, 566 S.W.2d 145 (1978); Pearce v. Hollis Const. Co., 212 Ark. 434, 205 S.W.2d 15 (1947); Excelsior Mining Co. v. Wilson, 206 Ark. 1029, 178 S.W.2d 252 (1944); Erskine Williams Lumber Co. v. Burgess, 159 Ark. 431, 252 S.W. 353 (1923).

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AMI 3024

Contract Interpretation
Construction Against One Who Drafted Contract

If you cannot decide the intention of the parties after considering the instructions that I have already given you concerning the interpretation of the ambiguous language in the contract, then you should interpret the ambiguous language against the party who prepared the contract.

NOTE ON USE

This instruction should be used as the final instruction pertaining to contract interpretation and should reference the previous instructions in the set pertaining to contract interpretation.

It may be inappropriate to give this instruction where both parties negotiated the written language of the contract.

COMMENT

The rule that ambiguous language should be construed against the drafter is subordinate to the rule that the fact finder should never adopt a construction which neutralizes a contract provision when the contract can be construed to give effect to all of its provisions. It is also subordinate to the primary rule that the intention of the parties be ascertained and effectuated. *See* Sturgis v. Skokos, 335 Ark. 41, 977 S.W.2d 217 (1998) (affirming chancellor's implied rejection of the rule that ambiguity should be construed against the drafter when the parties' course of performance conclusively demonstrated their intent); Les-Bil, Inc. v. General Waterworks Corp., 256 Ark. 905, 511 S.W.2d 166 (1974) ("The dominant rule is that interpretation of a contract is controlled by the intention of the parties."); Saltzman-Guenthner Clinic, Ltd. v. Burnett, 5 Ark. App. 56, 632 S.W.2d 441(1982) ("This rule must, however, give way in this cause to other rules of construction in our attempt to determine the parties' intent . . . ."). This instruction reflects these principles by requiring the jury to first attempt to ascertain the parties' intent through the dominant rules of construction before resorting to the subordinate rule and construing the ambiguous language against the drafter.

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AMI 3025
Modification of Contract

(Plaintiff/Defendant) contends and has the burden of proving [by clear and convincing evidence] that the parties modified their [written] contract.

A contract may be modified by a later oral or written agreement which meets each of the elements of a contract.

[Clear and convincing evidence is proof so clear, direct, weighty, and convincing as to enable you to come without hesitation to a clear conviction of the matter asserted.]

NOTE ON USE

This instruction should be followed by AMI 3002. Do not use this instruction when the parties' contract provides that the contract may not be modified except in writing.

Use the bracketed words and phrases only when the contract alleged to have been modified was in writing.

COMMENT

See In re Honeycutt, 198 B.R. 306 (Bankr. E. D. Ark. 1996); Leonard v. Downing, 246 Ark. 397, 438 S.W.2d 327 (1969); Linda Elenia Askew Trust v. Hopkins, 15 Ark. App. 19, 688 S.W. 2d 316 (1985). The burden of proof for an oral modification of an oral contract is apparently undecided by Arkansas courts. However, those jurisdictions which have addressed the issue have held that the burden of proof is by a preponderance of the evidence. *See* the cases cited in 17B C.J.S., Contracts §755, p. 483. The Committee has followed that authority in preparing this instruction but notes that subsequent decisions by Arkansas courts may require that this instruction be modified.

Arkansas law provides that clear and convincing evidence is required to prove the modification of a written contract by an oral agreement. Columbia Mut. Cas. Ins. Co. v. Ingraham, 47 Ark. App. 23, 883 S.W.2d 868 (1994), *rev'd on other grounds*, 320 Ark. 408, 896 S.W.2d 903 (1995); Amerdyne Indus., Inc. v. POM, Inc., 760 F.2d 875 (8th Cir. 1985).

The definition of clear and convincing evidence in this instruction is the definition used in AMI 408. *See* Maxwell v. Carl Bierbaum, Inc., 48 Ark. App. 159, 893 S.W.2d 346 (1995). *But see* Balch v. Leader Federal Bank, 315 Ark. 444, 868 S.W.2d 47, 50 (1993) in which clear and convincing evidence is defined as "that degree of proof that will produce in the trier of fact a firm conviction of the allegations sought to be established."

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AMI 3026
Contract's Implied Duty of Good Faith

Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement. The duty is an implied promise between the parties that they will exercise good faith in performing their obligations under the contract. Stated another way, the duty is an implied promise between the parties that they will not do anything to prevent, hinder or delay the performance of the contract. However, the duty does not obligate either party to take any action which is contrary to the express provisions of the contract.

COMMENT

See Cantrell-Waind & Associates, Inc. v. Guillame Motorsports, Inc., 62 Ark. App. 66, 968 S.W.2d 72 (1998).

In Country Corner Food and Drug, Inc. v. First State Bank and Trust Co., 332 Ark. 645, 966

S.W.2d 894 (1998), the Arkansas Supreme Court recognized that every contract imposes an obligation to act in good faith. However, the court declined to recognize a new tort for failure to act in good faith. 332 Ark. at 655-656, 966 S.W.2d at 898-99.

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AMI 3027
Breach

The parties dispute whether (Defendant) / (Plaintiff) did what the contract required of him. A party's failure to do what the contract required of him is a breach of the contract.

[A material breach is a failure to perform an essential term or condition which substantially defeats the purpose of the contract for the other party. A material breach excuses the performance of the other party (and allows that party to sue for damages on the whole contract.) A breach which is not material does not excuse the performance of the other party (but does allow the party to seek damages for the partial breach.)]

[A breach occurs when a party repudiates the contract before performance is due. Repudiation may consist of a statement reasonably interpreted to mean that the party will not or cannot perform the contract. It may also consist of a voluntary affirmative act which renders the party unable to perform.]

NOTE ON USE

Use the first bracketed paragraph when there is an issue as to whether the breach was material. Use the parenthetical sentences in that paragraph when appropriate.

Use the second bracketed paragraph when there is an issue as to whether there was an anticipatory breach of the contract. Do not use the second bracketed paragraph if the contract involves a sale of goods and is governed by Ark. Code Ann. § 4-2-610 or 611.

COMMENT

See Zufari v. Architecture Plus, 323 Ark. 411, 914 S.W.2d 756 (1996); TXO Production Corp. v. Page Farms, Inc., 287 Ark. 304, 698 S.W.2d 791 (1985); Dongary Holstein Leasing, Inc. v. Covington, 293 Ark. 112, 732 S.W.2d 465 (1987); Cox v. McLaughlin, 315 Ark. 338,867 S.W.2d 460 (1993); Jim Orr & Assoc., Inc. v. Waters, 299 Ark. 526, 530-531, 773 S.W.2d 99, 102 (1989); Stocker v. Hall, 269 Ark. 468, 472-473, 602 S.W.2d 662 (1980); De Lukie v. American Petroleum Co., 170 Ark. 453, 461, 280 S.W. 669 (1926); Ultracuts Ltd. v. Wal-Mart Stores, Inc., 70 Ark. App. 169, ___ S.W.3d ___ (2000); Bank of Cabot v. Bledsoe, 9 Ark. App. 145, 148-149, 653 S.W. 2d 144 (1983); Crockett & Brown, P.A. v. Courson. 312 Ark. 363, 849 S.W.2d 938 (1993); Economy Swimming Pool v. Freeling, 236 Ark. 888, 370 S.W.2d 438 (1963); Cox v. Bishop, 28 Ark. App. 210, 772 S.W.2d 358 (1989).

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AMI 3028
Substantial Performance

The parties dispute whether (Plaintiff/Defendant) did what their contract required of him. A party may recover on a contract even if he did not do everything that the contract required of him if his performance was substantial.

(Plaintiff/Defendant) contends and has the burden of proving that he substantially performed his contract with (Defendant/Plaintiff). Substantial performance cannot be determined by a mathematical rule. In determining whether performance was substantial, you should consider the following factors:

(1) The extent to which (Plaintiff/Defendant) will be deprived of the benefit which he reasonably expected;

(2) The extent to which (Plaintiff/Defendant) can be adequately compensated for the benefit of which he will be deprived;

(3) The extent to which (Plaintiff/Defendant) will suffer forfeiture;

(4) The likelihood that (Plaintiff/Defendant) will cure his failure, taking into account all circumstances, including any reasonable assurance that the failure will be cured; and

(5) The extent to which the behavior of (Plaintiff/Defendant) is consistent with standards of good faith and fair dealing.

COMMENT

See Prudential Ins. Co. of America v. Stratton, 14 Ark. App. 145, 685 S.W.2d 818 (1985); Cox v. Bishop, 28 Ark. App. 210, 772 S.W.2d 358 (1989).

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AMI 3029
Tender

(Plaintiff/Defendant) contends that he did what the contract required of him by tendering his performance to (Defendant/Plaintiff). Tender is a party's timely and good faith offer to perform under the contract and that party's present ability to immediately perform. To be effective, the tender must be made in accordance with the terms of the contract and on or before the time the performance of the party making the tender is due. In addition, the tender must be communicated to the other party.

[If the parties' contract does not specify a time for performance, the tender must be made within a reasonable time.]

[If the parties' contract does not specify the place of performance, the tender must be made at some reasonably convenient place, and the party making the tender must notify the other party of the place of tender.]

NOTE ON USE

Use the first bracketed paragraph when there is an issue as to the time for tender.

Use the second bracketed paragraph when there is an issue as to the place for tender.

COMMENT

The concept of tender involves both questions of law and fact. The trial court must first determine whether tender is required. For example, tender is not required when tender would be a vain and useless effort. Loveless v. Diehl, 235 Ark. 805, 364 S.W. 2d 317 (1962); Miller v. Willey Real Estate, 257 Ark. 961, 521 S.W.2d 68 (1975).

This instruction states the general rule concerning tender. *See* Telcoe Credit Union v. Eackles, 293 Ark. 149, 151, 732 S.W.2d 477 (1987); Loveless v. Diehl, *supra*; Miller v. Willey Real Estate, *supra*; 17A Am. Jur. 2d Contracts § 615 (1991).

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AMI 3030
Defense - Cancellation

(Defendant) contends that the parties canceled their contract and that it is no longer enforceable.

> In order to establish his claim, (Defendant) must prove each of two essential propositions:
>
> First, that the parties' contract had not been fully performed by [both][all] parties; and
>
> Second, that [both] [all] agreed to cancel the contract.

An agreement to cancel a contract may be oral, written or implied by the conduct of the parties. [If the agreement to cancel is oral, it must be proven by clear and convincing evidence. Clear and convincing evidence is proof so clear, direct, weighty, and convincing as to enable you to come without hesitation to a clear conviction of the matter asserted.]

[If you find from the evidence in this case that both of these propositions have been proved, then your verdict should be for (Defendant)].

NOTE ON USE

If the contract in question involves a sale of goods which is governed by Ark. Code Ann. § 4-2-209, do not use this instruction.

Use the first bracketed sentence concerning clear and convincing evidence when the alleged rescission is by oral agreement.

Do not use the second bracketed sentence when the case is submitted on interrogatories.

COMMENT

See Morgan v. Schackleford, 174 Ark. 337, 295 S.W. 46 (1927); Leonard v. Downing, 246 Ark. 397, 438 S.W.2d 327 (1969). When rescission of a written contract is based upon an alleged oral agreement, the burden of proof is clear and convincing evidence. Clark v. Duncan, 214 Ark. 83, 214 S.W.2d 493 (1948).

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AMI 3031
Defense - Accord and Satisfaction

(Defendant) contends and has the burden of proving that an accord and satisfaction occurred as to (Defendant's) obligations under the parties' contract. In order to establish his claim, (Defendant) must prove each of three essential propositions:

First, that the parties agreed that one would accept from the other a different performance in full satisfaction of the performance required by their contract;

Second, that both parties understood that their rights and obligations under their original contract would be canceled by their agreement; and

Third, that the party obligated to perform the substituted obligation actually performed it.

[If you find from the evidence in this case that each of these propositions has been proved, then your verdict should be for (Defendant)].

NOTE ON USE

If the case involves an instrument within the meaning of Ark. Code Ann. § 4-3-311, which provides special rules when an instrument is tendered in full satisfaction of a claim, this instruction may not be appropriate.

Do not use the bracketed sentence when the case is submitted on interrogatories.

COMMENT

See In re McMullan, 196 B.R. 818 (Bankr. W.D. Ark. 1996); Employees Ins. Of Wausau v. Polar Express, Inc., 780 F. Supp. 610 (W.D. Ark. 1996); Holland v. Farmers & Merchants Bank, 18 Ark. App. 119, 711 S.W.2d 481 (1986); Widmer v. Price Oil Co., 243 Ark. 756, 421

S.W.2d 885 (1967); Mademoiselle Fashions, Inc. v. Buccaneer Sportswear, Inc., 11 Ark. App. 158, 688 S.W.2d 45 (1984).

The committee has not prepared an instruction on the issue of novation. Novation is a species of accord and satisfaction, Harris v. Wildcat Corp., 556 P.2d 67, 69 (Idaho 1976), and occurs in the infrequent situation when a new party, who was neither entitled to performance nor owed a duty under the original contract, is substituted in a new contract. Harrison v. Benton State Bank, 6 Ark. App. 355, 642 S.W.2d 331 (1982). If the present instruction on accord and satisfaction is not satisfactory in a particular case involving the issue of novation, this instruction should be modified.

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AMI 3032
Defense - Release

(Defendant) contends and has the burden of proving that (Plaintiff) released him from the parties' contract.

In order to establish his claim, (Defendant) must prove each of two essential propositions:

First, that the parties entered into a written agreement by which one of the parties gave up his rights under the contract; and

Second, that there was consideration for the written agreement.

[If you find from the evidence in this case that both of these propositions have been proved, then your verdict should be for (Defendant)].

NOTE ON USE

If there are more than two parties to the contract, this instruction should be modified.

Do not use the bracketed sentence when the case is submitted on interrogatories.

COMMENT

See Green v. Owens, 254 Ark. 574, 495 S.W.2d 166 (1973); Skinner v. Fisher, 120 Ark. 91, 178 S.W. 922 (1915); Restatement (Second) of Contracts, § 284 (1981).

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AMI 3033
Defense - Fraud in Inducement

(Defendant) contends that (Plaintiff) fraudulently induced him to enter into the contract and has the burden of proving each of five essential propositions:

First, that (Plaintiff) made a false representation of material fact concerning the contract;

Second, that (Plaintiff) knew that the representation was false when it was made;

Third, that the representation was made for the purpose of inducing (Defendant) to enter into the contract;

Fourth, that (Defendant) justifiably relied upon the representation; and

Fifth, that (Defendant) would not have entered into the contract except for the false representation.

A fact or statement is material if it was a substantial factor in influencing (Defendant's) decision. It is not necessary, however, that it be the paramount or decisive factor, but only one that a reasonable person would attach importance to in making a decision.

If you find from the evidence in this case that each of these propositions has been proved, then your verdict should be for (Defendant)].

NOTE ON USE

Do not use the bracketed sentence if the case is submitted on interrogatories.

COMMENT

See Galion Iron Works & Mfg. Co. v. Otto V. Martin Const. Co., 176 Ark. 448, 460, 3 S.W.2d 310 (1928); Undem v. First National Bank, 46 Ark. App. 158, 164, 879 S.W.2d 451, 454 (1994) and AMI 402. This instruction does not address fraud by concealment or failure to disclose. *See* Ward v. Worthen Bank & Trust Co., N.A., 284 Ark. 355, 681 S.W.2d 365 (1984); Camp v. First Federal Savings & Loan, 12 Ark. App. 150, 671 S.W.2d 213 (1984); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. First National Bank, 774 F.2d 909 (8th Cir. 1985). If the alleged fraud is concealment or failure to disclose, this instruction should be modified.

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AMI 3034
Defense - Undue Influence

(Defendant) contends that his agreement to the contract was obtained by undue influence and has the burden of proving each of three essential propositions:

First, that [(Plaintiff) and (Defendant) were in a fiduciary relationship and (Plaintiff) had an unfair advantage over (Defendant) because of superior knowledge which (Plaintiff) derived from that relationship][(Plaintiff) was in a position of overpowering influence over (Defendant)][(Defendant) (was in a position of weakness or dependence)(or)(justifiably placed trust in (Plaintiff)];

Second, that (Plaintiff) took unfair advantage of the relationship with (Defendant); and

Third, that (Plaintiff's) undue influence was such that (Defendant's) decision to enter into the contract was not his free and voluntary act.

[If you find from the evidence in this case that each of these propositions has been proved, then your verdict should be for (Defendant)].

NOTE ON USE

Do not use the bracketed sentence if the case is submitted on interrogatories.

COMMENT

See Dent v. Wright, 322 Ark. 256, 909 S.W.2d 302 (1995); Restatement (Second) of Contracts, § 177 (1981); 17A Am. Jur. 2d Contracts § 237 (1991).

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AMI 3035
Defense - Duress

(Defendant) contends that he entered into the contract with (Plaintiff) under duress and has the burden of proving each of four essential propositions:

First, that he involuntarily accepted the terms of the contract;

Second, that he had no reasonable alternative other than to accept those terms;

Third, that his acceptance of those terms was the result of threats or coercive acts of (Plaintiff); and

Fourth, that (Defendant) renounced the contract without accepting its benefits.

[If you find from the evidence in this case that each of these propositions has been proved, then your verdict should be for (Defendant)].

NOTE ON USE

If the contract involves a sale of goods and presents an issue of unconscionability governed by Ark. Code Ann. § 4-2-302, do not use this instruction.

If the defendant alleges that the duress was caused by a person not a party to the transaction, this instruction should be modified. *See* Restatement (Second) of Contracts, § 175(2) (1981).

If the plaintiff alleges that the defendant did not renounce the contract within a reasonable time, this instruction should be modified. *See* Restatement (Second) of Contracts, § 381 (1981).

Do not use the bracketed sentence if the case is submitted on interrogatories.

COMMENT

See Cox v. McLaughlin, 315 Ark. 338, 867 S.W.2d 460 (1993); Restatement (Second) of Contracts, § 381 (1981).

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AMI 3036
Defense - Waiver - General Rule

(Defendant) contends that (Plaintiff) waived [a right] [his rights] under their contract and has the burden of proving two essential propositions:

First, that (Plaintiff) knew he had the contract right(s); and

Second, that (Plaintiff) voluntarily and intentionally abandoned the right(s).

[If you find from the evidence in this case that both of these propositions have been proved, then your verdict should be for (Defendant)].

NOTE ON USE

Use this instruction when the defendant alleges the defense of waiver by abandonment of the contract right.

Do not use the bracketed sentence when the case is submitted on interrogatories.

COMMENT

See Bharodia v. Pledger, 340 Ark. 547, 11 S.W.3d 540 (2000); Lester v. Mount Vernon-Enola School District, 323 Ark. 728, 732, 917 S.W.2d 540 (1996); Bright v. Gass, 38 Ark. App. 71, 831 S.W.2d 149 (1992).

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AMI 3037
Defense - Waiver of Breach By Acceptance of Benefits

(Defendant) contends that (Plaintiff) waived a breach of their contract and has the burden of proving two essential propositions:

First, that (Plaintiff) knew (Defendant) had breached their contract; and

Second, that (Plaintiff) continued to accept benefits under the contract and allowed (Defendant) to continue his performance of the contract.

[If you find from the evidence in this case that both of these propositions have been proved, then your verdict should be for (Defendant)].

NOTE ON USE

Use this instruction when the defendant contends that the plaintiff waived his right to claim a breach of contract by acceptance of benefits.

Do not use the bracketed paragraph when the case is submitted on interrogatories.

COMMENT

See S. O. Pipe Coating, Inc. v. Spear & Wood Mfg. Co., 235 Ark. 1021, 363 S.W. 2d 912 (1963); Stephens v. West Pontiac-GMC, Inc., 7 Ark. App. 275, 647 S.W. 2d 492 (1983).

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AMI 3038

Defense - Estoppel

(Defendant) contends that (Plaintiff) should be estopped from claiming a breach of contract and has the burden of proving each of four essential propositions:

First, (Plaintiff) knew *{state the particular fact(s) on which the estoppel is based}*;

Second, (Plaintiff) intended that (Defendant) act upon his [words][conduct][or][silence];

Third, (Defendant) was ignorant of *{state the particular fact(s) on which the estoppel is based}*; and

Fourth, (Defendant) relied upon (Plaintiff's) [words][conduct][or][silence] to his detriment.

[If you find from the evidence in this case that each of these propositions has been proved, then your verdict should be for (Defendant)].

NOTE ON USE

Do not use the bracketed paragraph if the case is submitted on interrogatories. The facts which are the basis of the alleged estoppel should be stated briefly and neutrally.

COMMENT

See Bedford v. Fox, 333 Ark. 509, 970 S.W.2d 251 (1998); Tribco Manuf. Co. v. People's Bank of Imboden, 67 Ark. App. 268, 998 S.W.2d 756 (1999). In order for silence to constitute an estoppel, there must be both the opportunity and the duty to speak. Anadarko Petroleum Co. v. Venable, 312 Ark. 330, 341-342, 850 S.W.2d 302, 308 (1993). In addition, the proof must also meet the following standard:

> The action of the person asserting the estoppel must be the natural result of the silence, and the silent party must be in a situation to know

that someone is relying on the silence to his detriment.

Id. If a case presents a fact issue concerning the appropriateness of "silence" as a basis for the defense, the instruction should be modified.

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AMI 3039
Defense - Impossibility of Performance

(Defendant) contends that his performance of the contract was impossible and has the burden of proving each of two essential propositions:

First, that (Defendant) diligently attempted to perform the contract; and

Second, that performance became impossible as a result of *{describe the legally recognized event on which the defendant relies; e.g., Act of God, change of law, death of essential party}*.

[If you find from the evidence in this case that both of these propositions have been proved, then your verdict should be for (Defendant)].

NOTE ON USE

Do not use the instruction when the contract involves a sale of goods and is governed by Ark. Code Ann. § 4-2-614, 615 or 616.

Do not use the bracketed paragraph when the case is submitted on interrogatories.

COMMENT

See Christy v. Pilkinton, 224 Ark. 407, 273 S.W.2d 533 (1954); Frigillana v. Frigillana, 266 Ark. 296, 584 SW 2d 30 (1979). In Christy, the Arkansas Supreme Court distinguished between objective impossibility (i.e., the thing cannot be done) and subjective impossibility (i.e., I cannot do it). Subjective impossibility does not discharge a party's contractual duty. The distinction between objective and subjective impossibility is not incorporated into this instruction. Instead, the Committee believes the trial court should determine whether the alleged impossibility is solely subjective and, if so, not submit the issue to the jury.

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AMI 3040

Defense - Disabling Illness

(Defendant) contends and has the burden of proving that his disabling illness excused his

performance of the contract. If a party contracts to perform a service that is purely personal, then the disabling illness of that party will excuse his performance.

[If the parties' contract contains (a) separate agreement(s) that (is)(are) not purely personal, and the agreement(s) pertaining to non-personal matters can be severed from the agreement relating to purely personal service, then the agreement(s) relating to non-personal matters may still be enforced.]

[If you find from the evidence in this case that this proposition has been proved, then your verdict should be for (Defendant)].

NOTE ON USE

Use the first bracketed paragraph when there is a contract which calls for performance which does not constitute a purely personal service.

Do not use the second bracketed paragraph when the case is submitted on interrogatories.

COMMENT

See Joshua v. McBride, 19 Ark. App. 31, 716 S.W.2d 215 (1986).

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AMI 3041
Defense - Plaintiff's Prevention of Performance

(Defendant) contends that (Plaintiff) prevented complete performance of their contract by (Defendant) and has the burden of proving this contention.

The failure of (Defendant) to perform their contract is excused if his performance is prevented or hindered by the conduct of the (Plaintiff).

[If you find from the evidence in this case that this proposition has been proved, then your verdict should be for (Defendant)].

NOTE ON USE

Do not use this instruction if the contract involves a sale of goods and is governed by a provision of the Uniform Commercial Code such as Ark. Code Ann. § 4-2-614, 615 or 616.

Do not use the bracketed paragraph if the case is submitted on interrogatories.

COMMENT

See Harris v. Holder, 217 Ark. 434, 230 S.W.2d 2d 645 (1950); Dickinson v. McKenzie, 197 Ark. 746, 126 S.W.2d 95 (1939); Cantrell-Waind & Assoc., Inc. v. Guillaume Motorsports, Inc., 62 Ark. App. 66, 968 S.W.2d 72 (1998).

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AMI 3042
Damages - General Rule

If you decide for (Plaintiff) on the question of liability][If an interrogatory requires you to assess the damages of (Plaintiff)], you must then fix the amount of money which will reasonably and fairly compensate him for the element(s) of damage sustained. [In order to fairly compensate (Plaintiff), any award should put (Plaintiff) in no better position than he would have been in if both (Plaintiff) and (Defendant) had performed all of their promises under the contract.]

The element(s) of damage which (Plaintiff) claims [is][are]:

[Here insert the elements.]

[First:]

[Second:]

[Third:]

[Etc.:]

Whether [this][any of these (*insert number*)] element(s) of damage has been proved by the evidence is for you to determine.

NOTE ON USE

Complete this instruction with the measure(s) of damage permitted by law or the measure agreed upon by the parties in their contract. If the proper measure of damages includes lost profits, see AMI 2206.

Use this instruction when no consequential or special damages are alleged. If consequential or special damages are alleged, use this instruction and also use AMI 3043.

Do not use the bracketed second sentence in the first paragraph of the instruction if the only element of damages is liquidated damages. If liquidated damages are determined as a matter of law, do not use this instruction.

This instruction is designed to be used both for claims of breach of contract and promissory estoppel. In the final paragraph of the instruction, the bracketed words "his promise" should be used if the instruction is used with a claim of promissory estoppel.

If there is evidence that the party claiming damages has failed to mitigate damages, see AMI

2230.

COMMENT

See Borman v. McFarlin, 1 Ark. App. 235, 615 S.W.2d 383 (1981); Rebsamen Companies, Inc. v. Ark. State Hospital Employees Federal Credit Union, 258 Ark. 160, 522 S.W.2d 845 (1975).

The proper measure of damages will depend upon the nature of the contract claim in each case. For example, depending upon the nature of his claim, the plaintiff may seek damages based either upon his expectancy or his reliance. *See generally* Brill, Arkansas Law of damages, § 17-1 (3rd ed. 1996). However, case law provides specific measures of damage for the breach of certain contracts. *E.g.*, Johnston v. Curtis, ___ Ark. App. ___, ___S.W.3d ___ (2000)(measure of damages for vendee's breach of executory contract for sale of land is the difference between contract price and market value at the time of the of breach, less the portion of the purchase price already paid).

In situations involving less than full performance, the measure of damages also varies depending upon the type of claim. Among the various measures of damages for such claims are the following:

> Partial performance: "the value of the benefit of (Plaintiff's) partial performance"[(1)]
>
> Substantial performance: "the contract price less the reasonable costs of completing the contract [and the reasonable costs of remedying any defects]"[(2)]
>
> Performance excused: "reasonable compensation for the service actually rendered"[(3)]
>
> Performance prevented: "the contract price less the cost to complete the contract" or "the reasonable value of his performance"[(4)]

If the parties' contract provides for liquidated damages, the amount of the liquidated damages should be inserted as the sole element of damages if the contract provision is mandatory. *See* McAllister v. McIlroy Bank, 9 Ark. App. 124, 654 S.W. 2d 591 (1983). However, if the liquidated damage provision in the contract is not mandatory, the plaintiff has the option of seeking actual damages or liquidated damages. *Id.* For a general discussion of the enforceability of liquidated damage provisions, *see* Johnson v. Jones, 33 Ark. App. 149, 807 S.W.2d 39 (1991).

1. Lynch v. Stephens, 179 Ark. 118, 14 S.W.2d 257 (1929). *See also* 17 Am. Jur. 2d Contracts § 636 (1991).

2. Prudential Ins. Co. v. Stratton, 14 Ark. App. 145, 685 S.W.2d 818 (1985). In cases in which performance is not substantial but recovery should be allowed on a quantum merit basis, *see also* Cox v. Bishop, 28 Ark. App. 210, 772 S.W.2d 358 (1989) and Pickens v. Stroud, 9 Ark. App. 96, 653 S.W.2d 146 (1983).

3. Lynch v. Stephens, 179 Ark. 118, 14 S.W.2d 257 (1929).

4. When performance is prevented, Arkansas law recognizes alternative measures of damages. Royal Manor Apartments v. Powell, 258 Ark. 166, 523 S.W.2d 909, 911 (1975).

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AMI 3043
Damages - Other Damages - Tacit Agreement Rule

In order to recover money in addition to the damages defined in the previous instruction, (Plaintiff) has the burden of proving each of two essential propositions:

First, that (Defendant) knew his breach of the parties' contract would result in special damages to (Plaintiff); and

Second, that the circumstances under which (Defendant) made the contract were such that (Defendant) should have understood that he had agreed to assume responsibility for the special damages.

If you find that the foregoing propositions have been proved by (Plaintiff), you shall award as additional damages:

[Insert the proper measure of special damages.]

NOTE ON USE

Use this instruction with AMI 3042 when the plaintiff alleges special or consequential damages. Insert the proper measure of special damages as permitted by law in the bracketed portion of the instruction.

COMMENT

See Morrow v. First Nat'l Bank, 261 Ark. 568, 550 S.W.2d 429 (1977); Stifft's Jewelers v. Oliver, 284 Ark. 29, 678 S.W.2d 372 (1984).

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AMI 3044
Issues - Promissory Estoppel

(Plaintiff) claims damages against (Defendant) for promissory estoppel and has the burden of proving each of four essential propositions:

First, (Defendant) made a promise to (Plaintiff);

Second, (Defendant) should reasonably have expected (Plaintiff) to [act in reliance on the promise] [refrain from acting in reliance on the promise];

Third, (Plaintiff) [acted] [refrained from acting] in reasonable reliance on the promise to his detriment; and

Fourth, injustice can be avoided only by enforcement of the promise.

NOTE ON USE

Insert the appropriate bracketed clause for the particular fact pattern presented.

Use AMI 3042 with this instruction.

COMMENT

See Van Dyke v. Glover, 326 Ark. 736, 934 S.W.2d 204 (1996); Dickson v. Delhi Seed Co., 26 Ark. App. 83, 760 S.W.2d 382 (1988); Restatement (Second) of Contracts § 90 (1981).

In regard to the fourth element of this instruction, *see* Hoffius v. Maestri, 31 Ark. App. 13, 786 S.W.2d 846 (1990) for five factors which may be used to determine whether "injustice" has occurred. If a case presents one or more of those factors, this instruction may need to be modified to instruct the jury on those issues.

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